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No. _____

In the
Supreme Court of the United States
October Term, 1995

Joan Valentine Mohamed,
f/k/a Joan Valentine Kerr,

Petitioner,

vs.

Kevin Scott Kerr and the
Estate of Ivan S. Kerr,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark C. McCullough
Counsel of Record
SKAAR & McCULLOUGH
One Financial Plaza, Suite 1900
120 South Sixth Street
Minneapolis, Minnesota 55402
(612) 333-1511

Attorney for Petitioner

1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTIONS PRESENTED FOR REVIEW

1. Does a marriage termination agreement, awarding each party "full right, title and interest" in life insurance policies, divest the former spouse, who remains named as the beneficiary, of her beneficiary rights in a qualified ERISA life insurance policy, where the policy specifically requires a written change of beneficiary?

2. Does a "broad and general" award of property in a marriage termination agreement, "without expressly mentioning beneficiary rights", constitute a proper, specific, and explicit waiver of a spouse's beneficiary rights in a qualified ERISA life insurance policy?

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Petitioner, Joan Valentine Mohamed, formerly known as Joan Valentine Kerr, ("Petitioner"), respectfully prays this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit dated April 27, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on April 27, 1995. A copy of the opinion is attached hereto as Appendix ("App.") A-1. The opinion of the United States District Court, District of Minnesota, Fourth Division, was rendered on July 11, 1994, filed and entered July 12, 1994. The District Court's opinion is attached hereto as App. A-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on April 27, 1995, reversing the District Court's Order dated July 11, 1994, entered July 12, 1994, granting the Petitioner's motion for summary judgment. Petitioner has timely filed this Petition for Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are quoted in App. A-31:

> The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1002, 1056, 1104, and 1144, (1988 & Supp. V 1993).

STATEMENT OF THE CASE

This case presents important questions regarding beneficiary rights under a qualified ERISA life insurance plan. The Petitioner requests the Supreme Court grant Certiorari in

order to resolve conflicts between the circuits and conflicts within the Eighth Circuit itself on these questions.

The Petitioner, Joan Valentine Mohamed, formerly Joan Valentine Kerr, was the spouse of Ivan S. Kerr. The Respondents are Kevin Scott Kerr and the Estate of Ivan S. Kerr. Kevin Scott Kerr is the son of Ivan S. Kerr. The beneficiaries of the Estate of Ivan S. Kerr are Kevin Scott Kerr and Dawn M. Valentine. Dawn M. Valentine is the daughter of Joan Valentine Mohamed.

This dispute involves a determination of the rightful beneficiary of life insurance proceeds under an ERISA qualified group life insurance policy on Ivan S. Kerr. Petitioner claims she is the rightful beneficiary of the policy. Respondents claim the Estate is entitled to the proceeds.

The Petitioner and Ivan S. Kerr were married on March 1, 1985. In December of 1986, Ivan S. Kerr designated the Petitioner as the 100 percent beneficiary of a group life insurance policy provided by Mr. Kerr's employer. No contingent beneficiary designation was made by Mr. Kerr. The group life insurance policy was an employee welfare plan regulated by ERISA, 29 U.S.C. § 1001-1461.

In February of 1988, Ivan S. Kerr was diagnosed with Alzheimer's disease. In August of 1988, a conservator was appointed for Mr. Kerr. In December of 1988, the Petitioner and Ivan S. Kerr, (individually and with his conservator joining), entered into a Marriage Termination Agreement which provided, at paragraph 7:

> That each of the parties shall be awarded full right, title, interest and equity in and to the bank accounts, stocks, bonds, savings accounts, pensions, retirement plans, combined IRAs, mutual funds, life insurance policies with any cash value thereon, limited and general partnership interests, and any other assets which are held in their name or for their benefit as of

the date of this Marriage Termination Agreement, free and clear of any claim by the other party.

On December 29, 1988, a judgment and decree of dissolution of marriage was entered by the Hennepin County District Court, dissolving the marriage and incorporating the provisions of the Marriage Termination Agreement, including paragraph 7. The life insurance policy at issue had no cash value.

Ivan S. Kerr died on January 8, 1992. Prior to Mr. Kerr's death, neither he nor his conservator attempted to file a change of beneficiary form with the employer or insurance company, nor otherwise indicated Mr. Kerr's desire or intent to change the beneficiary designation on file with the employer or insurance company. Further, no effort was made to obtain a qualified domestic relations order to effectuate a waiver of beneficiary rights as required under ERISA, 29 U.S.C. § 1056.

The ERISA qualified life insurance plan provides that death benefits are payable to the beneficiary designated by the employee. The plan also provides that a request for change of a beneficiary must be filed with the insurance company through the employer and will take effect as of the date the employee signs the request and files it with the employer. The plan also provides that life insurance benefits are payable to the employee's estate if no designated beneficiary survives the employee. As noted above, the employee, Ivan S. Kerr, did not file a request for a change of beneficiary, Petitioner is the named beneficiary, and the Petitioner survived the employee, Ivan S. Kerr.

After the death of Ivan S. Kerr on January 8, 1992, the Petitioner and Respondents requested payment of the death proceeds under the life insurance policy. Upon the insurer's refusal to pay the proceeds to the Petitioner or Respondents, Petitioner commenced a declaratory judgment action against

the insurance company and the Respondents in Hennepin County District Court, State of Minnesota.

The life insurance company removed the action from state court under 28 U.S.C. § 1441(a) and (b) on the basis of federal question jurisdiction under 28 U.S.C. § 1331. Jurisdiction of the United States District Court was based on ERISA, 29 U.S.C. § 1001, 1461.

On April 13, 1994, the District Court granted the insurance company's motion for interpleader and ordered the insurance company to pay the policy proceeds to the Clerk of Court. The insurance company was dismissed from the action, without prejudice.

Cross motions for summary judgment were argued on May 24, 1994. On July 12, 1994, the District Court granted the Petitioner summary judgment, determining that the Petitioner was entitled to the life insurance proceeds. The District Court, citing Lyman Lumber Company v. Hill, 877 F.2d 692 (8th Cir. 1989), held that the marriage termination agreement granting a spouse full right, title and interest in and to life insurance policies with cash value thereon, did not specifically refer to and modify the beneficiary interest of the Petitioner under the ERISA qualified insurance plan.

On April 27, 1995, the Eighth Circuit Court of Appeals reversed the District Court and directed that judgment be entered in favor of the Respondents, holding that the "broad and general" language of paragraph 7 of the Marriage Termination Agreement was intended to divest the Petitioner of her beneficiary rights under the insurance policy, notwithstanding the fact that the beneficiary rights to such policy were not expressly mentioned in paragraph 7. The Eighth Circuit concluded that the question of whether a beneficiary's rights were waived is a "fact-driven determination".

INTRODUCTION

The April 27, 1995, decision of the Eighth Circuit Court of Appeals is in conflict with the decisions of other Circuit Court of Appeals' decisions on the same issue and is in conflict with its own prior decision on the same issue. The April 27, 1995, decision departs from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to clarify the law regarding beneficiary modifications and waivers in ERISA plans and resolve the conflict among the circuits.

The question presented in this case regarding a named beneficiary's rights in an ERISA qualified plan has been raised in four circuits. The circuits have resolved this issue with conflicting opinions. As noted in Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), cert. denied, ____ U.S. ____, 115 S.Ct. 732, (1995), "The difficult circumstances presented by the facts of the present case have been confronted with surprising frequency by a variety of our sister circuits. While these issues have not been previously faced by this court, we find some consistency in the treatment afforded by other circuits." Id. at 1324. (Emphasis added.)

For the reasons stated herein, Petitioner believes there also have been some inconsistencies in the treatment afforded by the other circuits.

The Petitioner believes the correct resolution of the question was made by the Sixth Circuit Court of Appeals in McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990). In McMillan, the court held that under the governing plan

documents and under ERISA, 29 U.S.C. 1104, the named beneficiary on file with the plan administrator is entitled to the plan benefits, if the deceased spouse did not file a change of beneficiary form prior to death.

The decision of the Eighth Circuit Court of Appeals dated April 27, 1995, conflicts with the decision of the Sixth Circuit's holding in McMillan. The Eighth Circuit held that a designated beneficiary's rights under an ERISA plan can be divested by a marriage termination agreement with broad and general wording, without reference to the beneficiary rights and without the filing of a change of beneficiary form.

The Fifth and Seventh Circuits have also rendered decisions in conflict with McMillan. Additionally, the Eighth Circuit in its April 27, 1995, decision contradicted its own prior decision in the case of Lyman Lumber Company v. Hill, 877 F.2d 692 (8th Cir. 1989).

An analysis of the decisions from the four circuits demonstrates not only a conflict, but a need for this Court to exercise its supervisory power over the circuits to bring uniformity and consistency to ERISA qualified pension and life insurance plans.

The Lyman case involved a husband's interest in a profit-sharing plan governed by ERISA. The divorce decree stated that the husband "shall have as his own, free of any interest of [spouse] his interest in the profit-sharing plan of his employer." Lyman, 877 F.2d at 693. The husband died without changing his plan beneficiary designation after a divorce. Lyman, 877 F.2d at 693. The Eighth Circuit Court of Appeals found that the language in the divorce decree did not divest the spouse of her beneficiary interest in the plan, because the terms of the divorce decree did not specifically divest the spouse's rights as a beneficiary under the plan. The court noted in Lyman:

> A number of courts have held that the spouse's rights as a beneficiary are extinguished only by terms specifically divesting the spouse's rights as a beneficiary under the policy or plan.
>
> The decree gave Jeffrey his entire interest in the Plan free of any interest of Colleen. It did not, however, specifically refer to and modify the beneficiary interest. The divorce decree thus did not revoke the beneficiary designation, and Colleen is entitled to the Plan benefits.
>
> Lyman, 877 F.2d at 693, 694 (citations omitted).

Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), cert. denied, 498 U.S. 820 (1990), involved a husband's interest in a pension plan governed by ERISA. The divorce decree at issue stated, "The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party." Fox Valley, 897 F.2d at 277. The Seventh Circuit held that this language constituted "an explicit mutual waiver of any rights each might have had in the other's pension plan," distinguishing Lyman. Fox Valley, 897 F.2d at 280. Applying this analysis, The Seventh Circuit held that the specific mutual waiver divested the surviving divorced spouse of any interest in the plan benefits.

In Fox Valley, the dissent filed by Circuit Judge Ripple, with Chief Judge Bauer and Circuit Judges Easterbrook and Manion joining, reasoned that since the pension plan required the participant to file a change of beneficiary form in order to effectuate a change in the plan and no such change was filed, no change of beneficiary would be recognized, notwithstanding the language of the divorce decree. The

analysis of the dissent in Fox Valley was followed and ultimately adopted by the Sixth Circuit in McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990).

McMillan involved a husband's interest in a pension plan governed by ERISA. The parties' joint settlement agreement contained "a broad waiver clause in which each spouse relinquished any and all claims he or she might have against the other." McMillan, 913 F.2d at 311. After the divorce, the husband did not change the beneficiary status on file with the plan administrator. The Sixth Circuit Court of Appeals held that the divorced spouse was entitled to the plan benefits, notwithstanding the broad waiver language of the parties' settlement agreement, because the deceased insured spouse had failed to file a change of beneficiary form as required by the plan. As an additional ground for its decision, the court found that the broad written waiver clause was not effective because it did not specifically refer to the spouse's rights as beneficiary in the ERISA plan. McMillan, 913 F.2d at 312. In McMillan, the court noted, "The waiver provision in Barbara Parrott's divorce settlement, however emphatic, does not specifically refer to her interest as beneficiary of these ERISA plans." McMillan, 913 F.2d at 312.

Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), cert. denied, ____ U.S. _____, 115 S.Ct. 732, (1995), involved a husband's interest in a life insurance welfare plan governed by ERISA. In Brandon, the court stated:

> The divorce decree provided that, 'Petitioner [Richard] is awarded the following as Petitioner's sole and separate property, and Respondent [Wanda] is divested of all rights, title, interest and claim in and to such property . . . and any other rights relating to any profit sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses or other benefit program

existing by reason of Petitioner's past, present or future employment.'

Brandon, 18 F.3d at 1323.

The Fifth Circuit acknowledged that in McMillan the Sixth Circuit had reached a decision which would have required the proceeds to be paid to the named beneficiary on file. Rather than following the McMillan case, the Fifth Circuit in Brandon noted, "The alternative approach taken by courts faced with a similar problem to the one we face today is to look to federal common law to resolve the question of how beneficiaries are designated." Brandon, 18 F.3d at 1326, citing Fox Valley, 897 F.2d at 281, and Lyman, 877 F.2d at 693.

In Brandon, the court found that a valid, specific waiver of beneficiary rights had to be made by the designated spouse beneficiary to effectively divest the spouse of her beneficiary rights. Thus, the Fifth Circuit in Brandon concluded that the language of the marriage termination agreement was a valid specific waiver of the beneficiary rights under the insurance policy, notwithstanding the failure to file a change of beneficiary form. However, in order to find the specific waiver required under Lyman and Fox Valley, the Fifth Circuit in Brandon relied on a unique Texas statute which requires a life insurance plan participant to redesignate an ex-spouse after a divorce in order to maintain the ex-spouse as a designated beneficiary. "In this case, as urged by Abbott, we adopt the Texas rule creating a presumption of waiver absent redesignation following divorce." Tex. Fam. Code Ann. § 3.632 (West 1987), Brandon, 18 F.3d at 1326. There is no similar statute in Minnesota.

Review of the published opinions regarding this issue reflects that a divorced spouse's beneficiary rights under an ERISA qualified life insurance or pension plan are dependent

on which circuit court hears the case and the court's application of federal common law created to address each "fact-driven determination" in the case before the court. Inconsistent "fact-driven determinations" are contrary to the intent and letter of ERISA.

ERISA is the governing law under which such plans are qualified. As noted by the court in McMillan, the intent of Congress in adopting the ERISA provisions is that ERISA plans be uniform in their interpretation and simple in their application. "Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." See H. Rep. No. 533, 93rd Cong., 2nd Sess., reprinted in 1974 U.S.C. Cong. & Admin., News 4639, 4650.

To attain the "uniformity of decision", ERISA specifically provides that the ERISA provisions shall "supersede any and all State laws insofar as they now and hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title." 29 U.S.C. § 1144.

Uniform interpretation and simple application are required for both ERISA pension and life insurance plans. 29 U.S.C. § 1002, Subds. 3 and 8. Further, ERISA mandates that plan administrators discharge their duties, "[I]n the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan . . ." 29 U.S.C. § 1104. Finally, ERISA mandates that a beneficiary's rights in a plan may not be assigned or alienated. 29 U.S.C. § 1056. The only exception to these provisions is if the beneficiary's rights are subject to a qualified domestic relations order under 29 U.S.C. § 1056(d)(3)(A). The requirements for a qualified

domestic relations order were not met in the Kerr Marriage Termination Agreement or the judgment and decree.

Here, as in the McMillan case, the governing plan required the participant to file a change of beneficiary form to accomplish a change in the beneficiary. ERISA requires that any change of beneficiary be accomplished as mandated by the plan. The courts in Lyman, Fox Valley and Brandon have all, contrary to the letter and intent of ERISA, carved out nonstatutory exceptions to the uniform and simple application of ERISA under the auspices of federal common law. The creation of this federal common law has thwarted the policy, letter and intent of ERISA, resulting in inconsistent decisions based on "fact-driven determinations".

The Sixth Circuit in McMillan, holding that the beneficiary on file at the time of death governs, reasoned:

> A participant is master of his own ERISA plan. Dr. Parrott agreed to the plans, including the provision concerning the designation and change of beneficiary, kept these documents in his office, and did not change the beneficiary in over four years. Simply put, it was Dr. Parrott's designation which controls, not Barbara's intent. Under the plans, we determine his intent by the designation on file at the time of his death.
>
> Such a holding also allows the parties to be certain of their rights and obligations.

McMillan, 913 F.2d at 312 (citation omitted).

Certiorari should be granted to resolve the conflicts in the circuit courts and to determine the proper application and uniformity of the ERISA rules.

II. Certiorari should be granted to review the Eighth Circuit's misapplication of the law regarding proper waiver of beneficiary rights in a marriage termination agreement.

If the Supreme Court is not willing to grant Certiorari on the basis of the inconsistencies in the decisions of the circuits on the question presented, Certiorari should be granted because the Eighth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings by ignoring and misapplying the holdings of Lyman Lumber Company v. Hill, 877 F.2d 692 (8th Cir. 1989); Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), cert. denied, 498 U.S. 820 (1990); McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990); and Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), cert. denied, ____ U.S. _____, 115 S.Ct. 732, (1995).

Prior to the April 27, 1995, decision of the Court of Appeals, the Fifth, Seventh and Eighth Circuits had carved out a narrow exception to the ERISA requirement that the named beneficiary receive the plan or insurance proceeds unless a change of beneficiary form is filed as required by the plan. The exception created was that a former spouse could, in a proper waiver form, divest his or her beneficiary rights in an ERISA plan. The proper waiver requirement provided that a waiver be in terms specifically divesting the spouse's beneficiary rights under the policy or plan. See Lyman, Fox Valley, and Brandon.

Here, the Eighth Circuit Court of Appeals ignored its own holding in Lyman and the Seventh Circuit's holding in Fox Valley, by conceding that although the marriage termination agreement was broad and general and not specific, and did not refer to the beneficiary rights of the plans, the Petitioner's beneficiary rights were waived.

To justify its departure from its prior holding in Lyman and the holding in Fox Valley, the Eighth Circuit relied exclusively on the Brandon case. The language of the divorce decree in Brandon provided that the divorced spouse was divested of all right, title and interest in and to such property and other rights relating to any profit-sharing or pension plan. In this case, the Eighth Circuit determined that the waiver language in Brandon was similar to the language of paragraph 7 of the Kerr Marriage Termination Agreement. This analysis is erroneous for two reasons.

First, the divorce decree in Brandon referred to a "divesting of a divorced spouse's rights to a specific plan." Brandon, 18 F.3d 1323. In this case, paragraph 7 of the Marriage Termination Agreement does not refer to any "divesting" nor to any specific insurance plan, rather only to life insurance with any cash value thereon. The insurance policy in question did not have any cash value and was not covered by the language of the Marriage Termination Agreement.

Secondly, the Brandon case arose in Texas, which had a specific statute requiring a life insurance participant to redesignate an ex-spouse after divorce in order to keep the beneficiary designation in effect. Tex. Fam. Code Ann. § 3.632 (West 1987). In Brandon, the deceased spouse had not redesignated his ex-spouse after the divorce, and the court adopted the Texas rule, creating a presumption of waiver absent redesignation following divorce. There is no redesignation statute in Minnesota. The Eighth Circuit did not even address this legal distinction when relying on the Brandon case as support for its decision to ignore the clear holdings of Lyman, Fox Valley and McMillan.

The Eighth Circuit obviously wanted to reach a result it felt was equitable, based upon its view of the "fact-driven determination". The facts which "drive" this decision, and which the court relied on, are insufficient as a matter of law to

reach the conclusion of the Eighth Circuit on April 27, 1995. In Brandon, the Fifth Circuit Court of Appeals stated that, "The holding in Lyman is such as to require that courts look with great perspicacity in finding a waiver of benefits by a divorce decree." Brandon, 18 F.3d at 1326, 1327.

Certiorari should be granted by the Supreme Court for an opportunity to review the Eighth Circuit Court of Appeals' rationale in arriving at a decision which was contrary to the prior decisions of the circuits, including its own decision in the Lyman case, and to exercise its supervisory powers over the circuits.

CONCLUSION

The questions presented here are significant and important and have been confronted by the circuit courts with surprising frequency. These questions will undoubtedly arise again.

While the Sixth Circuit Court of Appeals believes that there is some consistency in the treatment of this question, there are obvious and admitted inconsistencies. Given the legislative history of ERISA, its pre-emption of state law, and its clear mandate that the provisions of the plan be followed regarding beneficiary designation, the Supreme Court should grant Certiorari to determine if federal common law can be created to allow for prohibited exceptions to the clear requirements of ERISA and qualified plans. Petitioner submits that the decision in McMillan is the law that was intended to be followed under ERISA and should be followed by the circuit courts.

Additionally, Certiorari should be granted because the Eighth Circuit Court of Appeals departed from the normal and usual course of judicial procedure by fashioning a result inconsistent with the narrow exception to the rule that the designated beneficiary receive the insurance proceeds.

For the above-stated reasons, The Petitioner respectfully asks this Court to grant her Petition for Certiorari.

Respectfully submitted,

MARK C. McCULLOUGH

SKAAR & McCULLOUGH
One Financial Plaza, Suite 1900
120 South Sixth Street
Minneapolis, MN 55402
(612) 333-1511

Attorney for Petitioner
Joan Valentine Mohamed

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2953

Joan Valentine Mohamed, formerly known as Joan Valentine Kerr,	*	
Appellee,	*	
v.	*	Appeal from the United States District Court for
Kevin Scott Kerr; Ivan S. Kerr, Estate of,	*	the District of Minnesota.
Appellants.	*	
UNUM Life Insurance Company, of America, a Maine corporation,	*	
Defendant.	*	

Submitted: February 15, 1995

Filed: April 27, 1995

Before BOWMAN, BEAM, and HANSEN, Circuit Judges.

BOWMAN, Circuit Judge.

The estate of Ivan S. Kerr and its personal representative, Kevin Scott Kerr (collectively, the estate), appeal from the decision of the District Court granting Joan Valentine Mohamed's motion for summary judgment and denying the estate's motion for summary judgment. We reverse.

Mohamed and Ivan Kerr were married on March 1, 1985. In December 1986, Mohamed completed an enrollment form for Kerr's participation in his employer's flexible benefits plan. On that form, Mohamed was designated as beneficiary of the $265,000.00 in group life insurance benefits;[1] no contingent beneficiary was named and the form was unsigned. On January 9, 1987, Kerr was terminated from his job. In February 1988, he was diagnosed with presenile dementia, Alzheimer's disease.

In June 1988, Mohamed petitioned the probate court for appointment of a general conservator for Kerr and his estate. In July, she began proceedings to dissolve the marriage, and in August a conservator was appointed. The dissolution was final in December 1988. In paragraph 7 of the Marriage Termination Agreement,[2] Mohamed and Kerr stipulated as follows:

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[1] In completing the form, Mohamed indicated that Kerr had selected $279,000.00 in life insurance coverage. The form specified, however, that interim coverage for that selection would be $265,000.00. The benefit would increase only when the insurance company received evidence of insurability, and it never did. In the District Court, Mohamed nevertheless sought payment to her of the higher benefit. The court determined that coverage was for the lesser amount, a decision that is not appealed.

[2] The language of paragraph 7 of the Marriage Termination Agreement is also found, without material alteration, in paragraph 8 of the Conclusions of Law that constituted the final judgment and decree of dissolution.

> That each of the parties shall be awarded full right, title, interest and equity in and to the bank accounts, stocks, bonds, savings accounts, pensions, retirement plans, combined IRAs, mutual funds, life insurance policies with any cash value thereon, limited and general partnership interests, and any other assets which are held in their name or for their benefit as of the date of this Marriage Termination Agreement, free and clear of any claim by the other party.

It is undisputed that Mohamed remarried soon after her divorce from Kerr was final, and she apparently did not visit Kerr between the time she left him and his death on January 8, 1992.

After Kerr died, Mohamed sued UNUM Life Insurance Corporation of America, the employer's group life insurance carrier, in state court seeking to compel UNUM to pay the insurance proceeds to her. Because Kerr's estate also claimed the policy benefits, UNUM removed the action to federal court, brought a motion for judgment in interpleader, and deposited the insurance proceeds with the court.[3] The estate and Mohamed filed cross-motions for summary judgment. Judgment was granted to Mohamed, and the estate appeals.

We review a decision to grant summary judgment de novo. We will affirm only if we agree that there are no genuine issues of material fact and that Mohamed is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

The estate raises seven "issues" on appeal, which are more properly characterized as arguments that can be distilled into one issue, the resolution of which will dictate the result: Did paragraph 7 of the Marriage Termination

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[3] The court awarded UNUM its attorney fees and costs in defending the action. That decision is not appealed.

Agreement entered into by Mohamed and Kerr operate to nullify the earlier designation, made when the couple was married, of Mohamed as beneficiary of Kerr's group life insurance policy?[4]

Before we proceed to the merits, it is necessary for us to resolve the question of what law controls. The estate challenges the District Court's decision "for failure to apply current Minnesota law," Appellants' Brief at 11A, and Mohamed says the court "correctly applied federal and state law," Appellee's Brief at 2. (The District Court itself said that it was applying federal common law.) Neither party has demonstrated a clear understanding of how a federal court determines the law to apply in a case such as the one before us.

Although it seems logical that state law would control, the interpretation of a marital termination agreement ordinarily being a matter of state law, that is not the case here. The group life insurance policy at issue is an employee welfare benefit plan, and the case is in federal court because the plan is regulated by the Employee Retirement Income Security Act (ERISA) , 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993). See American Airlines, Inc. v. Wolens, __U.S.__, __,115 S. Ct. 817, 825 (1995) (noting in dicta that ERISA "does channel civil actions into federal courts under a comprehensive scheme, detailed in the legislation, designed to promote 'prompt and fair claims settlement'") (citation omitted)

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[4] Among its issues, the estate claims that the court erroneously decided that a material fact was undisputed: whether or not Mohamed knew of the UNUM group life insurance policy when she signed the 1988 termination agreement that divided the marital property, or, more accurately, whether or not she remembered the policy, since she clearly knew about it in 1986. Resolution of any dispute about this fact is unnecessary to our holding, and so it is not a material fact. Thus a dispute about this question of fact would not preclude summary judgment.

(quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)). In this case, no cause of action was stated under an ERISA provision, and the parties are not claiming that a particular ERISA section expressly governs the issue before us. Therefore, we are compelled to look to federal common law. See Pilot Life Ins. Co., 481 U.S. at 56; Reid v. Connecticut Gen. Life Ins. Co., 17 F.3d 1092, 1098 (8th Cir. 1994) ("where there is no federal statutory law to apply in ERISA litigation, 'federal common law,' not state law, should be applied"). The federal courts may look to state law for guidance in developing federal common law, but it is inappropriate to apply state law if it conflicts with ERISA or its underlying policies. Brewer v. Lincoln Nat'l Life Ins. Co., 921 F. 2d 150, 153 (8th Cir. 1990), cert. denied, 501 U.S. 1238 (1991); see also Pilot Life Ins. Co., 481 U.S. at 56 ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502 (a) [29 U.S.C. § 1132 (a), the civil enforcement provisions of ERISA] could be supplemented or supplanted by varying state laws.").

Each party is adamant about its own citation of "controlling" law--one a Minnesota appeals court case and the other an Eighth Circuit case--because each believes its key case will win the day for the party that relies upon it. We do not believe, however, that the two cases compel different results.

The estate believes that Larsen v. Northwestern National Life Insurance Co., 463 N.W.2d 777 (Minn. Ct. App. 1990), review denied (Minn. Feb. 6, 1991), controls, and that the result it seeks in this case is bolstered (if not ordained) by the teachings of that case. In Larsen, the decedent designated her husband to be the beneficiary of an insurance policy on her life. Nearly five years later, the couple divorced. Pursuant to a stipulated property settlement incorporated into the divorce

decree, decedent and her husband were "awarded all right, title and interest in those life insurance policies covering his or her respective life." Id. at 780 (quoting the stipulation). Decedent died less than two months after the dissolution was final without changing the beneficiary (although there was evidence that she intended to), and her former husband claimed he was entitled to the proceeds of the life insurance policy.

The court held that, despite the absence of a specific reference in the stipulation to the beneficiary interests of the life insurance policies, the language "granting *'all right, title and interest'* contemplated rights beyond the cash surrender value of the policy or the right merely to receive physical delivery of the policy," and included the divestment of the former spouses' beneficiary rights in each other's life insurance policies. Id. The court further found that "the stipulation and dissolution decree adequately demonstrated decedent's intent that she no longer wished her ex-husband to have any interest in her life insurance policy," and decided it must "give effect" to that intention. Id. at 781. It is obvious why the estate would prefer that Larsen control the result in this case.

Mohamed directs our attention to Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989). Lyman, a case on appeal from federal district court in Minnesota, concerned an ERISA-regulated employee profit-sharing plan. Decedent designated his wife as beneficiary of his profit-sharing plan five years before the couple was divorced. The divorce decree stated that decedent "shall have as his own, free of any interest of (his former spouse), his interest in the profit-sharing plan of his employer." Id. at 693 (quoting the decree) (alteration by this Court). Applying federal common law, the Court concluded that the divorce decree gave the decedent "his entire interest in the Plan free of any interest of" his former wife, but did not "specifically refer to and modify the beneficiary interest." Id. at 693, 694. The Court noted that it was indeed possible for a property settlement entered into

pursuant to a dissolution of marriage to revoke a former spouse as beneficiary, but "only by terms specifically divesting the spouse's rights as a beneficiary under the policy or plan." Id. at 693. The settlement at issue in the case, the Court held, had not done so.

Thus, under federal common law, a settlement entered into pursuant to a judgment of dissolution may divest a former spouse of beneficiary rights to life insurance proceeds, even when the beneficiary designation has not been changed before the death of the insured. Cf. Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904, 907 (10th Cir. 1991) (stating that "absent any applicable divorce decree dictating otherwise," the former spouse who was the designated beneficiary was entitled to life insurance proceeds, given that state statute requiring otherwise was preempted by ERISA). Larsen, then, is clearly in accord with the body of federal common law on this issue. That case applied the same rule of law as Lyman--that a property settlement entered into pursuant to a dissolution may divest former spouses of beneficiary rights in each other's life insurance policies, if the agreement makes it clear that the former spouses so intend. There is no inherent conflict in the law set forth in the two decisions, nor does Larsen conflict with the policies of ERISA. Because Lyman and Larsen had different facts, however, the cases had different results. Here, it is Kerr's and Mohamed's application of the law to the facts of this case that are in conflict, not the law that is to be applied.

The question remains for us to decide, based on the record before us in this fact-driven determination, whether the Kerr settlement "specifically divest[ed] the spouse's rights as a beneficiary under the policy." Lyman, 877 F.2d at 693. Mohamed would have us read this standard to require that the property settlement explicitly mention the beneficiary interest, in order to "specifically divest" her of that interest. The Lyman Court, while noting that the decree at issue did not

"specifically refer to and modify the beneficiary interest," id. at 694, did not elaborate upon the sort of specificity that would be required to divest a former spouse of a beneficiary interest via a divorce decree. The federal common law as it has developed since Lyman was decided, however, makes it clear that the law does not require that the word "beneficiary" appear in the language of the agreement in order for a beneficiary interest to be divested.

In 1990, the Seventh Circuit en banc affirmed a district court decision that the Lyman opinion cites. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990). In Fox Valley, the following language in a property settlement, agreed to pursuant to a divorce, was held to have operated as "an explicit mutual waiver," id. at 280, of former spouses' rights to each other's pension plan benefits: "The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party." Id. at 277 (quoting the property settlement). The court held as it did even though the former spouse still was the named beneficiary of the benefits when her ex-husband died, and in spite of the fact that the beneficiary interest was not specifically mentioned in the settlement. As in the Larsen stipulation and the Kerr agreement, but unlike the Lyman decree, the divestment of rights was not one-sided but mutual. Each party gave up any interest in the other's assets. Moreover, on another point that distinguishes the Fox Valley and the Kerr agreements from the Lyman decree, the parties gave up not only present "interest" but any future "claim" (such as a claim one otherwise might have as the named beneficiary of life insurance proceeds when an insured former spouse dies).

In Brandon v. Travelers Insurance Co., 18 F.3d 1321 (5th Cir. 1994), cert. denied, __U.S.__, 115 S. Ct. 732 (1995), the court held that language awarding to the decedent as his sole

and separate property "[a]ny and all sums . . . and any other rights relating to any" employee benefit plan, and divesting the wife "of all rights, title, interest, and claim in and to such property," id. at 1323 (quoting the divorce decree), was effective as an "explicit, voluntary [waiver of ERISA benefits] made in good faith," id. at 1327. It is plain that the language in the Brandon decree, like that in the Fox Valley agreement (and the Larsen stipulation, for that matter), is more akin to the Kerr language than that found in the Lyman decree. In Brandon, there was no mention of beneficiary interests as such, but "all rights, title, interest, and claim" was determined to include any beneficiary interest. We hold that the language "full right, title, interest and equity" that appears in paragraph 7 of the Kerr Marriage Termination Agreement comprehends any beneficiary interests or rights, notwithstanding that they are not expressly mentioned.

Unlike the situation in Lyman, where only one well-defined asset was at issue, the language of paragraph 7 was broad, general, and obviously intended to be inclusive. In Lyman it would have been a simple matter to identify with some specificity the rights and interests attached to one asset and to allocate them between the parties. Such was not the case with the Kerr agreement, where potentially many different assets were being divided. We also think it significant that, if the Kerr agreement did not divest Mohamed of her beneficiary interest in the UNUM policy, then the language of paragraph 7 is meaningless as to that policy. If we construe the agreement as Mohamed suggests, then it did nothing but possibly give Kerr a right to physical possession of the life insurance policy--a right so meaningless as not to be a right at all--and the ability to change the beneficiary--a right he had regardless of the divorce. See Larsen, 463 N.W.2d at 780 (concluding that the language of the decree at issue was intended to include more than life insurance policy's cash

surrender value and physical delivery of the policy to the insured).

Apart from the actual language of the Kerr Marriage Termination Agreement, we believe that the facts surrounding the Kerrs' divorce are especially compelling for our conclusion that the agreement evidenced a mutual intent to divest. At oral argument, counsel for Mohamed acknowledged that Kerr's Alzheimer's disease precipitated Mohamed's decision to divorce Kerr. Once Kerr was diagnosed with the disease, Mohamed could not get away fast enough, and she never looked back. We do not believe it is putting too fine a point on it to say that she abandoned him to his illness. The marriage lasted only a bit more than three years, and the couple had no children together. Once the divorce was final all ties between Mohamed and Kerr were severed.

There is no indication in the record that Mohamed was responsible, after the divorce, for expenses associated with Kerr's care, medical treatment, or funeral, for which life insurance proceeds might be needed. Evidently the estate paid for those items. Moreover, the life insurance proceeds were not required for Mohamed's ongoing support. There were no children of the marriage whose subsistence was threatened by Kerr's death, and because no maintenance was awarded to Mohamed, she did not feel the loss of any income (or anything else, apparently) when Kerr died; in fact, she remarried soon after the divorce and well before Kerr's death. Mohamed suffers no hardship from the result we reach today.

Mohamed argues that paragraph 7 of the Marriage Termination Agreement does not reflect the intent or expectations of herself or of Kerr as regards the UNUM policy, because Kerr's conservator was unaware of the UNUM policy and because Mohamed claims that she had become unaware of it by the time of the divorce. We disagree. The language of the Marriage Termination Agreement, although it does not mention the UNUM policy, is clear: Kerr and

Mohamed agreed to be divested of **any** interest in and claim to **all** of each other's life insurance policies. Given the agreement's comprehensive language, it is clear that Mohamed did not intend or expect to be the beneficiary of **any** policy owned by Kerr and insuring Kerr's life. She took what she could from the marriage and walked away with no further interest in or contact with Kerr--until her recollection about the UNUM insurance policy was refreshed. We think it disingenuous of Mohamed to suggest that she expected or intended to remain the beneficiary of a life insurance policy, while simultaneously claiming to have had no knowledge of that policy when she agreed to mutual divestment of beneficiary interests in all life insurance policies. The parties clearly intended this paragraph as a "catch-all" disposition of all "paper" assets of the couple not otherwise specifically divided. The failure of the Marriage Termination Agreement to specifically mention the UNUM policy is of no consequence when the divestment is as sweeping as the one set forth here. The termination agreement did not define in detail any of the enumerated assets, including the life insurance policies that Mohamed was able to recall at the time of the divorce, but reflects the parties, intent that all such assets as generally described be mutually divested.

Notwithstanding the fact that we are applying federal common law to the construction of this property settlement language, we note, as did the Fifth Circuit in Brandon, that "[f]ederal respect for state domestic relations law has a long and venerable history." Brandon, 18 F.3d at 1326. We have before us a provision of a Marriage Termination Agreement that, given the circumstances of this case, is quite clear. It is a mutual and complete divestment of present interests and future claims in the enumerated assets. This divestment was agreed to by the parties voluntarily and in good faith, and was approved by the state court judge who awarded the judgment of dissolution. We see no reason not to give effect to it. "The

oversight of the family courts is suitably armored to protect the rights at stake in this case and we find the approach of this opinion preferable to asserting that ERISA should act as a surrogate law of divorce." Id. at 1327.

Finally, the District Court held, and Mohamed agrees, that in any event Mohamed is entitled to the proceeds of the UNUM policy because the policy is not one of the assets described in paragraph 7 of the Marriage Termination Agreement, to wit, it is not a "life insurance polic[y] with any cash value thereon." Mohamed sees the phrase "with any cash value thereon" as a modifier of "life insurance policies," and thus argues that term life insurance policies, such as the UNUM policy, are not included in the assets itemized in paragraph 7. We disagree. Clearly, the Marriage Termination Agreement, and paragraph 7 in particular, were intended to be, and should be read as, disposing of all claims of the divorcing parties against each other's property. Restricting the definition of life insurance policies as Mohamed suggests would fail to give effect to the agreement. We think the phrase "with any cash value thereon" should be read, as a matter of law, to mean "together with any cash value thereon." That is, the phrase dealing with life insurance should not be taken out of context and read to restrict the type of life insurance policies to which the language of divestment applies, in light of the remainder of the paragraph and its extraordinarily comprehensive language affecting the assets of both parties.

The judgment of the District Court is reversed and the case is remanded with directions to enter summary judgment for the estate.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

JOAN VALENTINE MOHAMED f/k/a Joan Valentine Kerr,

Plaintiff,

v.

UNUM LIFE INSURANCE CORPORATION OF AMERICA, a Maine Corporation, KEVIN SCOTT KERR, and the ESTATE OF IVAN S. KERR,

Defendants.

Civil File No. 4-94-15

ORDER

MARK McCULLOUGH, Esq., appeared for Plaintiff.

ROBERT FINE, Esq. , appeared for Defendants Kevin Scott Kerr and the Estate of Ivan S. Kerr.

JONATHAN LEBEDOFF, United States Magistrate Judge

The above-entitled matter came on for hearing before the undersigned Magistrate Judge of District Court on May 24, 1994, on the parties' cross motions for summary judgment. Before deciding the cross-motions, the Court must determine the amount that is owing under the policy and also will decide

the request of Defendant UNUM Life Insurance Company of America ["UNUM"] for its attorneys' fees.[1]

The Court has jurisdiction over this matter pursuant to the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ["ERISA"]. Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties have voluntarily waived their rights to proceed before a judge of the United States District Court and have consented to have the undersigned United States Magistrate Judge conduct any and all further proceedings in the case, including entry of a final judgment.

I. BACKGROUND

A. Procedural History

Plaintiff commenced this action when she sued UNUM in state court for payment of life insurance benefits which became due on account of the death of her former husband, Ivan S. Kerr. UNUM subsequently removed the action to the United States District Court. On April 13, 1994 this Court ordered UNUM to deposit with the Clerk of Court the proceeds of that insurance policy, along with interest. The Court further ordered that all claims against and by UNUM be dismissed without prejudice.

B. Facts

Plaintiff and Ivan Kerr were married on March 1, 1985. Prior to his death Ivan Kerr was an employee of The Northland Company ["Northland"] and thus became a participant in Northland's employee welfare benefit plan. The

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[1] In its April 13, 1994 Order, this Court expressly reserved ruling on the proper amount due on the policy and upon UNUM's motion for attorney's fees.

group life insurance benefit provided under this plan was funded by UNUM's Group Life Insurance Policy No. 500180 (the "policy"], which provides that upon the death of an insured, UNUM will pay life insurance benefits "to the beneficiary designated by the employee." (See Plaintiff's Ex. O.)

At some time in December of 1986, on an enrollment form for the policy, Kerr designated Plaintiff, then known as Joan Valentine Kerr, as his life insurance beneficiary. On the application, Kerr circled coverage in the amount of $279,000. The application states, however, that "interim coverage" of $265,000 would be provided pending submission of evidence of insurability. (See Plaintiff's Ex. B.) UNUM never received any evidence of insurability. (See Sparks Aff. ¶ 6.) UNUM sent to Kerr a letter confirming that his coverage was $265,000. (See Plaintiff's Ex. C).

Plaintiff attests that she filled out the form at Kerr's request because Kerr's handwriting was so poor. (See Mohamed Aff. ¶ 9.) The policy was a term life policy and had no cash value.

On January 9, 1987, shortly after completing the enrollment form, Kerr was terminated from his employment with Northland. On February 23, 1988 Maland Hurr, M.D., diagnosed Plaintiff as suffering from presenile dementia or Alzheimer's disease. Dr. Hurr stated that it was "apparent" that Kerr had "not been in a position to be productive for well over a year." (See Plaintiff's Ex. D.) On May 24, 1988, in a Physician's Statement in Support of Guardianship, Dr. Hurr stated that Kerr had "a significantly advanced dementing condition with poor capacity for planning, judgment, response inhibition, and creative problem solving." He further stated that Kerr had "no insight into [his condition] and [did] not recognize gross and obvious errors of judgment or thought production." (See Plaintiff's Ex. E.)

On August 22, 1988 Terrance Larpenteur was appointed to serve as general conservator for Kerr and his estate. The appointing order granted Larpenteur the following powers and duties:

> e. Approve or withhold approval of any contract, except for necessities, which the conservatee may make or wish to make.
>
> . . . .
>
> h. Possess and manage the estate, collect all debts and claims in favor of the conservatee, or with the approval of the Court, compromise them, and invest . . . all funds not currently needed for debts and charges and management of the estate.

(See Plaintiff's Ex. F.)

Larpenteur, acting pursuant to the above powers, brought claims on behalf of Kerr against Mutual Benefit Life Insurance Company and UNUM for disability insurance benefits. Settlements of these claims were approved by the Hennepin County Probate Court on April 17, 1991. (See Plaintiff's Exs. H and I.)

In July of 1988 Plaintiff began dissolution of marriage proceedings against Kerr. On December 22, 1988, Plaintiff and Larpenteur, on behalf of Kerr, entered into a Marriage Termination Agreement which provides in pertinent part

> that each of the parties shall be awarded full right, title, interest and equity in and to . . . life insurance policies with any cash value thereon. . . . and any other assets which are held in their name or for their benefit . . . free and clear of any claim by the other party.

(See Plaintiff's Ex. L at 5 and Ex. N at 5.) (See Larpenteur Aff. ¶ 10.) At all times during the termination

proceedings, and until his death in January of 1992, Kerr was incompetent and unable to act on his own behalf. The Court thus finds that as conservator for Kerr, Larpenteur had the authority, upon approval by the probate court, to effect a change of beneficiary with respect to the policy.

In his November 1988 Inventory and Appraisal, which listed Kerr's assets and liabilities, Larpenteur did not list the policy as one of Kerr's assets. (See Larpenteur Aff. ¶ 3.) Nor did Plaintiff list the policy as an asset of her marriage to Kerr in a questionnaire she completed for her former attorney with regard to her divorce proceedings against Kerr. (See Plaintiff's Ex. M.) Nor was the policy listed in either the Marriage Termination Agreement or the Findings of Fact, Conclusions of Law, order for Judgment and Judgment and Decree. It is undisputed that neither Plaintiff nor Larpenteur knew of the policy from the time that Larpenteur was appointed conservator until Kerr's death.

Kerr died on January 8, 1992. Larpenteur's final account of Kerr's conservatorship, dated January 14, 1993, stated that the estate had a balance of $24,984.67. (See Plaintiff's Ex. J.) On or about April 17, 1992 Defendant Kevin Kerr submitted to UNUM a group life insurance claim form for the proceeds of the policy. (See Plaintiff's Ex. A.) UNUM determined, however, that the beneficiary named on Ivan Kerr's enrollment form was Plaintiff. (See Sparks Aff. ¶ 9.) In a letter dated July 8, 1992, UNUM notified Kevin Kerr of Plaintiff's competing claim and suggested that the parties attempt to settle the matter without litigation. (See Sparks Aff. Ex. E.) Such negotiations failed to bring about a settlement and this lawsuit followed.

II. DISCUSSION

A. The Proper Amount Due on the Policy

The policy application required as a condition precedent to coverage in the amount $279,000, Kerr was to submit evidence of insurability. UNUM sent to Kerr a confirmation letter which again stated that UNUM required evidence of insurability to trigger the $279,000 coverage. Kerr, however, failed to comply with the express terms of the application and never submitted any such evidence. Accordingly, the Court holds that $265,000 is the proper amount owing under the policy.

The Court further holds that UNUM properly calculated the interest on the amount due under the policy.[2] Plaintiff submits that Minn. Stat. § 61A.011 applies in this action and that UNUM owes more interest than it has heretofore paid. UNUM calculated the interest pursuant to its own policy because the policy, which was part of an employee welfare benefit plan, was governed by ERISA which preempts state law.

The preemption provisions of ERISA provide:

> Except as provided in Subd. (b) of this section, the provisions of this subchapter and subchapter II of this chapter shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan.

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[2] UNUM's rate is based on the three-month treasury bill rate plus 30 basis points. UNUM determined the interest rate on the date of payment and pays interest on death proceeds from the date of death to the date of payment. In this case, $18,416.32 was calculated in interest and included in the amount in which UNUM deposited with the court. (See Sparks Aff. ¶ 7.)

> [N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance.

29 U.S.C. § 1144(a) and (b)(2)(A). Under these provisions any state law which "relate[s] to" an employee benefit plan is preempted by ERISA unless it is a law which "regulates insurance under § 1144(b)(2)(A)." In re Life Ins. Co. of N. Am., 857 F.2d 1190, 1194 (8th Cir. 1988).

The Supreme Court has held that the preemption provisions must be broadly construed: "[T]he phrase "'relate to"' [is] given its broad common-sense meaning, such that a state law "'relate[s] to' a benefit plan "'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 729 (1985) (quoting Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 98 (1983)).

The Court holds that Minn. Stat. § 61A.001 relates to an employee benefit plan and is thus preempted by ERISA. Courts which have examined various state law penalty provisions have held that such laws are preempted by ERISA. In In re Life Ins. Co. of N. Am., the court examined a Missouri "vexatious refusal to pay" statute. The plaintiff attempted to apply the statute in a case where a long-term disability insurer discontinued benefits to him. In re Life Ins. Co. of N. Am., 857 F. 2d at 1191. Without reference to the actual language of the statute, the court held that the Missouri statute was preempted by ERISA. The court reasoned that it fell within the "broad common-sense meaning of the phrase 'relates to"' as the statute had a "substantial affect on benefit plans because it provides a penalty for any bad faith refusal to pay out of the plan." Id. at 1194.

More specifically, in Camire v. Aetna Life Ins. Co., 822 F. Supp. 846 (D.N.H. 1993), the court examined whether a New

Hampshire statute which required certain interest payments on the proceeds of life insurance was preempted. The court concluded that the interest statute was related to a benefit plan even though it was "not specifically designed to affect such plans and only . . . indirectly affect[ed] such plans." Id. at 850-51 (citing Ingersoll-Rand v. McClendon, 498 U.S. 133, 139 (1990)). See also Coles v. Metropolitan Life Ins. Co., 837 F. Supp. 764, 768 (M.D. La. 1993) (Louisiana statute providing for extra contractual damages, penalties and attorneys fees, preempted by ERISA); Coonce v. Aetna Life Ins. Co., 777 F. Supp. 759, 767-68 (W.D. Mo. 1991) (statutory and common law claims for misrepresentation related to medical benefits under a group health insurance plan are preempted by ERISA).

The statute at issue in the present case, like the New Hampshire statute in Camire, requires certain interest payments on the proceeds of an insurance policy. Also like the New Hampshire stature in Camire, section 61A.011 "relates to" an employee benefit plan, i.e., the policy at issue, even though it may not have been "specifically designed to affect such plans and . . . only indirectly affect[ed] such plans." Id. Accordingly, the Court holds that ERISA preempts Minn. Stat. § 61A.011.

The Court further finds that the mandatory insurance penalty provisions of Minn. Stat. § 61A.011 are not "saved" from ERISA preemption, 29 U.S.C. § 1144(b)(2)(A). ERISA's savings clause exempts only those state insurance laws that regulate the "business of insurance." Metropolitan Life Ins. Co., 471 U.S. at 742-73. Courts typically use the definition of the "business of insurance" found in the McCarran-Ferguson Act to define which statutes fall within the insurance savings clause. Id.

Under the McCarran-Ferguson Act, three criteria are relevant to determine whether a state law is "saved": "'first, whether the practice has the effect of transferring or spreading

policyholders' risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."' Metropolitan Life Ins. Co., 471 U.S. at 743 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)).

Courts which have applied this three-step analysis to state law penalty provisions have held that such provisions are not "saved" from ERISA preemption. In Camire, the court held that the New Hampshire penalty statute was not saved. First, the court held that the interest penalty statute did not transfer or spread policy risk. Camire, 822 F. Supp. at 851. Secondly, the court found that the statute did not effect an integral part of the relationship between the insurer and insured because the statute did not regulate the terms of the actual contract between the parties. Id. Finally, while the court noted that the interest statute was, by its terms, limited to entities within the insurance industry, that factor, in and of itself, was not dispositive in holding that the interest statute was not saved from ERISA preemption. Id. at 851-52. See also In re Ins. Co. of N. Am., 857 F. 2d at 1194 (court concluded that the Missouri vexatious refusal to pay statute was not saved).

Section 61A.011 does not transfer or spread policy risk; rather, it only operates after insurance has already been procured and a claim has been made. Nor does the statute affect an integral part of the relationship between the insurer and the insured because it does not regulate the terms of the contract itself. Id. at 851 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50-51 (1987) (common law claim of bad faith concerns the policy relationship between insurer and insured but connection is attenuated at best because it does not define the terms of the relationship itself)). Third, although the statute is limited to entities within the insurance industry, "no particular factor of the McCarran-Ferguson Act is dispositive; rather each is instructive." Id. at 851-52

(internal quotations omitted). Accordingly, the Court finds that Minn. Stat. § 61A.011 is not exempt from ERISA preemption under the savings clause, 29 U.S.C. § 1144 (b) (2) (A). The Court further finds that UNUM properly applied its own calculation of interest for the proceeds on the policy.

B. UNUM's Motion for Attorneys' Fees

It is well established that a court has the discretion to award an innocent stakeholder its attorneys' fees and costs. See, e.g., Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1164 (5th Cir. 1976); Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F. 2d 188, 194 (9th Cir. 1962); 7 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice & Procedure, § 1719 (1986). The test for determining whether fees are proper is whether the stakeholder "should be required to assume the risk of multiplicity of actions and erroneous election." Wright, et al., supra § 1719.

UNUM never claimed an interest in the policy benefits. It did however have Plaintiff's and Defendant Kevin Kerr's competing claims for the fund when Plaintiff sued UNUM in state court. UNUM thereafter removed the action to federal district and promptly brought its motion for judgment in interpleader and deposited the funds with the court. The Court holds that UNUM should not have been required to assume the risk of multiple actions and should not be forced to bear the costs of defending this action, which, in fact, benefits the claimants by providing a forum for resolution of their dispute. Schirmer Stevedoring Co., 306 F.2d at 193; Wright, et al., supra § 1719. Accordingly, the Court awards UNUM its attorneys' fees and costs.

When determining the amount of attorneys' fees to be awarded, a court may consider a number of factors:

> 1) whether the case is simple or involved; 2) whether the stakeholder performed any unique services for the claimants or the court; 3) whether the stakeholder acted in good faith and with diligence; 4) whether the services rendered benefitted the stakeholder; 5) whether the claimants improperly protracted the proceedings.

Wright, et al., supra § 1719.

UNUM at no time claimed a right to the fund. Rather, faced with competing claims, it attempted to persuade the adverse claimants to settle their dispute without resorting to litigation. After such efforts were unsuccessful and after it was sued, UNUM promptly deposited the fund with the Court.

UNUM's counsel attests that (1) he has expended 24.9 hours; (2) his associate has expended 23.4 hours; and (3) his legal assistant has expended 3.5 hours on this matter. He further attests that (1) his normal hourly rate, based on his years of practice and experience in ERISA matters is $150.00 per hour; (2) his associate's normal hourly rate is $110.00 per hour; and (3) his paralegal's normal hourly rate is $75.00 per hour. Finally, he attests that costs incurred in this litigation total $286.00. UNUM therefore requests a total of $6857.50 as attorneys' fees and costs.

The Court finds that UNUM's attorneys' fees and costs are reasonable and, in its discretion, will award such fees and costs in the amount of $6857.50, which sum shall be paid from the fund previously deposited with the Clerk of Court.

C. Motions for Summary Judgment

It is an undisputed fact that Plaintiff is the named beneficiary of the policy. Also undisputed is the fact that neither Kerr nor Larpenteur ever changed that designation. Plaintiff argues that she is thus entitled to the proceeds of the policy under state and federal law. Defendants Kevin Kerr and

the Estate of Ivan Kerr argue, however, that the Marriage Termination Agreement divests Plaintiff of any interest in the policy. Defendants further argue that the equities weigh heavily in favor of awarding the proceeds of the policy to the estate.

1. **Standard for Summary Judgment**

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). This standard mirrors the standard for a judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Under that rule a court may grant judgment as a matter of law if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In other words, summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248. In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A fact is material only when its resolution affects the outcome of the case. Anderson, 477 U.S. at 248. on a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. Id. at 250. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise genuine issues for trial. Celotex, 477 U.S. at 324.

2. Applicable Law

Because the policy is an employee benefit that is governed by the ERISA, and because none of ERISA's express provisions addresses the issues presented in this case, the Court must ascertain the proper federal common law principles that should govern. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987); Anderson v. John Morrell & Co., 830 F. 2d 872, 877 (8th Cir. 1987). In fashioning a body of federal common law, a court may look to state law for guidance. See Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 457 (1957); Scott v. Gulf oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985).

3. Plaintiff is Entitled to the Insurance Benefits

The Court of Appeals for the Eighth Circuit has recently decided a case with facts closely analogous the those of the present case. In Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989), a deceased had designated his former wife as the primary beneficiary of his employer's profit sharing plan. The two were subsequently divorced, and the divorce decree stated that the deceased would "'have as his own, free of any interest of [the former wife], his interest in the profit-sharing plan of his employer.'" Id. at 693. The deceased died eighteen months after the divorce, without having changed his beneficiary designation. Id. The profit sharing plan's trustees informed the former wife that they planned to distribute the benefits to the contingent beneficiaries, the deceased's parents and brother. The former wife initially accepted the trustee's determination but then revoked her waiver of her rights to the benefits. Id.

The Court noted the general rule that "a divorce does not affect a beneficiary designation in a life insurance policy," but

that such a "beneficiary interest could be divested pursuant to a property settlement in a divorce judgment," or "by terms specifically divesting the spouse's rights as a beneficiary under the policy." Id. (citing Fox Valley and Vicinity Constr. Workers Pension Fund v. Brown, 684 F. Supp. 185, 188 (N.D. Ill. 1988), aff'd, 897 F. 2d 275 (7th Cir. 1990)). The court apparently adopted the latter position and held that the former wife was entitled to the profit sharing benefits. The court concluded that the divorce decree, while it "gave the [former husband] his entire interest in the [profit sharing plan] free of any interest of [the former wife,] [i]t did not . . . specifically refer to and modify the beneficiary interest." Id. at 693-94.

The Minnesota Court of Appeals has also dealt with a situation similar to that presented by this matter. In Larsen v. Northwestern Nat'l Life Ins. Co., 463 N.W.2d 777 (Minn. Ct. App. 1991), the deceased had named her former husband as the beneficiary of a life insurance policy. Id. at 779. Four years later, the two were divorced, and, pursuant to an agreement that was incorporated into the dissolution decree, each was awarded "all right, title and interest in the insurance policies covering his or her respective lives." Id. During the divorce proceedings, the deceased had asked her attorney if she could change the above noted designation of her former husband as beneficiary of the life insurance policy. The attorney advised her to wait until after the divorce had become final. Id. She had also indicated that in the event of her death, she wished the proceeds of the policy to go to her mother. Id. Fifty days after the divorce was finalized, and before the deceased had changed the beneficiary designation, she died in an automobile accident. Id.

The Larsen court, like the Lyman Lumber court, noted that a dissolution of marriage does not ordinarily affect the beneficiary designation of a life insurance policy, id. (citing 4 Couch on Insurance (Second) § 27:11 (1984)), absent a

surrender by the former spouse pursuant to a property settlement. Id. (citing 5 Couch on Insurance (Second) § 29:4 (1984)). To determine whether a property settlement agreement bars an ex-spouse beneficiary's right to the proceeds, the court must construe the agreement itself: "'Where there is no provision that the effecting agreement should deprive [the ex-spouse] of her rights as named beneficiary and she in fact remains named as beneficiary, the settlement agreement will not be given broader scope than its express terms specify.'" Id. at 779-80 (quoting 5 Couch on Insurance (Second) § 29:4 (1984)). The Larsen court then held that the ex-spouse was not entitled to the proceeds of the policy. The court stated that the agreement, by which each was awarded "all right, title and interest" in policies covering their lives, "clear[ly] . . . was intended to divest (the former husband] of his rights as beneficiary." Id. at 780.

In the present case, the language of the Marriage Termination Agreement, which was incorporated into the court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, awarded Plaintiff and Kerr "full right, title, interest and equity in and to . . . life insurance policies with any cash value thereon, and any other assets which are held in their name or for their benefit." As in Lyman Lumber, the parties did not "specifically refer to and modify the beneficiary interest" of the policy. Lyman Lumber Co., 877 F.2d at 693-94. Therefore, the general rule that a marriage dissolution does not affect a beneficiary designation in a life insurance policy applies, and Plaintiff remains the beneficiary of the policy at issue.

Further, the relevant language in the present case is as clear as the language in the agreement in Larsen, but its clarity compels a different result. Whereas the Larsen decree awarded each spouse his or her interest in any and all life insurance policies, Larsen, 463 N.W.2d at 779, Plaintiff and Kerr agreed that each would be awarded "full right, title,

interest and equity in and to . . . life insurance policies with any cash value thereon."[3] Defendants submit that the phrase "with any cash value thereon" actually means all policies "'together with' any cash value thereon or 'including' any cash value thereon." Defendants' brief at 7. The Court holds that by this language Plaintiff and Kerr referred only to insurance policies that had cash value. This Court will not give the agreement broader scope than its express terms specify. Id. at 780.

Defendants submit that via the marriage termination agreement Kerr intended to effect a change the beneficiary designation. "A change of beneficiary of an insurance policy may be effectuated without notice to the insurer where the insured's efforts are otherwise in substantial compliance with the requirements imposed by the contract." Id. Minnesota courts employ a two part test to determine whether there has been an effective change of beneficiary: "(1) whether there was an intent to change the beneficiary by the insured; and (2) whether the insured acted affirmatively or otherwise did substantially all possible to show intention whether or not she complied with policy change of beneficiary provisions." Id. (citing Brown v. Agin, 109 N.W.2d 147, 150 (Minn. 1961)).

To meet this test, Defendants must present evidence that Kerr himself intended to change the beneficiary designation. See, e.g., Lemke v. Schwarz, 286 N.W.2d 693 (Minn. 1979) (insured wrote letter in which he stated his wish that his wife not receive life insurance benefits); Brown, 109 N.W.2d 147 (Minn. 1961) (insured attempted to retrieve insurance policies being held by his wife and which named wife as beneficiary; and attempted to file change of beneficiary forms with insurer but was prevented from doing so by court order); Larsen, 463 N.W.2d at 780-81; Gwin v. Gappa, 394 N.W.2d 530 (Minn. Ct. App. 1986) (insured's completion of change of beneficiary

[3] It undisputed that the policy now at issue had no cash value.

form without delivery of same to insurer not sufficient to indicate whom he wished to be beneficiary). Defendants have not provided such evidence, and indeed they cannot. As discussed supra, the Marriage Termination Agreement does not provide such evidence. And due to his incompetency, from February 1988 until his death in January 1992, Kerr was unable to form an intent with respect to changing beneficiaries. Brown, 109 N.W.2d at 151. Nor is there any evidence that Kerr acted affirmatively to demonstrate such intention. Id. Further, although Larpenteur as conservator had the authority, upon court order, to effect a change of beneficiary to the policy, he failed to do so. Accordingly, the Court holds that because there is no evidence of intent to change beneficiaries, there was no effective change of beneficiary effected and Plaintiff remains as beneficiary.

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

1) The Clerk of Court shall collect from the fund previously deposited with the Clerk a registry of administration fee equal to ten percent (10%) of the interest earned pursuant to 56 Fed. Reg 56,356 (1991);

2) Defendant UNUM Life Insurance Corporation of America's Motion for Attorneys' Fees is **GRANTED**; UNUM is awarded attorneys' fees and costs in the amount of $6857.50; such sum shall be paid from the fund principle previously deposited with the Clerk;

3) Plaintiff's Motion for Summary Judgment is **GRANTED**; the Clerk shall pay the balance of the principle and interest of the fund to Plaintiff, after payment of the registry administration fee and attorneys' fees and costs; and

4) Defendants Kevin Scott Kerr's and Estate of Ivan S. Kerr's Motion for Summary Judgment is **DENIED**.

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 11, 1994.

s/s
JONATHAN LEBEDOFF
United States Magistrate Judge

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1002, 1056, 1104, and 1144, (1988 & Supp. V 1993), in relevant parts:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan. who is or may become entitled to a benefit thereunder.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service,

which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

§ 1056

(d) Assignment, or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

§ 1144. other laws

(a) supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

H. Rep. No. 533, 93rd Cong., 2nd Sess., reprinted in 1974 U.S.C. Cong. & Admin., News 4639, 4650, in relevant part:

RETIREMENT INCOME SECURITY ACT
P.L. 93-406

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

P.L. 98-406, see page 935

House Report (Education and Labor Committee) No. 93-533, Oct. 2, 1973 [To accompany H.R. 2]
House Report (Ways and Means Committee) No. 93-807, Feb. 21, 1974 [To accompany H.R. 12855]
Senate Report (Labor and Public Welfare Committee) No. 93-127, Apr. 18, 1973 [To accompany S. 4]
Senate Report (Finance Committee) No. 93-383, Aug. 21, 1973 [To accompany S. 1179]
House Conference Report No. 93-1280, Aug. 12, 1974 [To accompany H.R. 2]
Senate Conference Report No. 93-1090, Aug. 13, 1974 [To accompany H.R. 2]
Cong. Record Vol. 120 (1974)

DATES OF CONSIDERATION AND PASSAGE

House February 28, August 20, 1974
Senate March 4, August 22, 1974
The House and Senate Reports and the House Conference Report are set out.

HOUSE REPORT NO. 93-533

Third, even assuming that the law of trusts is applicable, without detailed information about the plan. access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended effectuated by the Act.

Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

UNUM Life Insurance Company, policy number 500180, in relevant part:

	Policyholder: THE NORTHLAND COMPANY
GROUP LIFE,	
GROUP	Policy Number: 500180
ACCIDENTAL	Policy Year: January 1, 1987 to December 31, 1987 and each following January 1 to December 31.
DEATH	Policy Effective Date: January 1, 1987
AND	Premium Due Dates: January 1 and the first day of each following month.
DISMEMBERMENT,	Governing Jurisdiction: MINNESOTA
	Policy Anniversary: January 1, 1988, and each following January 1.
GROUP	
MEDICAL CARE	Unionmutual Stock Life Insurance Co. of America (referred to as the Insurance Company) will pay the benefits provided in this policy. The
AND	Insurance Company makes this promise subject to all of this policy's provisions.
GROUP	The Policyholder should read the Policy Specifications carefully and

	contact the Insurance Company promptly with any questions.
DENTAL CARE	
	This Policy is delivered in and is governed by the laws of the governing jurisdiction.
INSURANCE	
	Signed for the Insurance Company at Portland, Maine on the Policy
POLICY	Effective Date.
FLEXIBLE BENEFITS	THIS POLICY HAS BEEN CERTIFIED BY THE MINNESOTA DEPARTMENT OF COMMERCE DIVISION OF INSURANCE AS A QUALIFIED PLAN 3.
NON PARTICIPATING	

s/ Kevin J. Tierney
Secretary

s/ Colin C. Hampton
President

Unionmutual Stock Life Insurance Co. of America
A Stock Life Insurance Company

J. PAYMENT OF CLAIMS

1. Benefits Payable For Loss of Life - Employee

Benefits for an employee's loss of life are payable to the beneficiary designated by the employee.

a. Designation of Beneficiary

The beneficiary designation or any request for change of beneficiary must be:

i. filed with the Insurance Company through the employer; and

ii. on a form satisfactory to the Insurance Company.

b. Change of Beneficiary

Any request for change of beneficiary will take effect as of the date the employee signs and files it with his employer. But if the Insurance Company has taken any action or has made payment, the change of beneficiary will not go into effect. The consent of the beneficiary will not be required to change any beneficiary.

c. Payment To Beneficiary

SECTION VI - GENERAL POLICY PROVISIONS (continued)

If more than one beneficiary is designated on the same form and the employee does not designate their order of rights, the beneficiaries will share equally.

The share of a beneficiary who dies before the employee will pass to any surviving beneficiaries in the order the employee designated.

Payment may be made to the executor or the administrator of the employee's estate if:

i. an employee dies without having designated a beneficiary; or

ii. no designated beneficiary survives the employee.

UNUM Life Insurance Company beneficiary designation, in relevant part:

Beneficiaries for your LIFE insurance: Surviving beneficiaries will be paid equally unless otherwise indicated.
Name: Joan Valentine Kerr % 100 relationship: wife
Name:_____%_____relationship:_____
Name:_____%_____relationship:_____

I have received and read the printed materials explaining the Flex Benefits Program and my options under the program. I understand that by signing and submitting this form I am making a binding election for my benefits and authorizing payroll reductions from my salary.

Although it is anticipated that a new enrollment form will be completed each year, I understand that if for any reason I fail to complete a new enrollment form, the elections indicated on this form will be honored and the cost of those elections may change.